88-730

No.

Supreme Court, U.S.
FILED
NOV 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FOREST HILLS EARLY LEARNING CENTER, INC.,
ACADEMY DAY CARE, INC., AND
HOLLOMAN CHILD CARE CENTERS, INC.,
Petitioners,

v.

LARRY D. JACKSON, AS DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE COMMONWEALTH OF VIRGINIA,

and

GRACE BAPTIST CHURCH, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN VANDERSTAR
(Counsel of Record)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

JOHN E. HEINTZ
STEPHANIE E. HUMBERT
POPHAM, HAIK, SCHNOBRICH
& KAUFMAN, LTD.
1800 M Street, N.W.
Suite 300 South
Washington, D.C. 20036
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

QUESTION PRESENTED

Is a state's decision to exempt church-run child care centers from child care licensing standards that concern matters such as ventilation, heat, cots, nutrition and space per child based on the objection of some churches to any licensing of their child care activities immune from judicial scrutiny under the Establishment Clause to determine whether the exemption alleviates a significant burden on the ability of such centers to define and carry out their religious missions?

PARTIES

Petitioners Forest Hills Early Learning Center, Inc., Academy Day Care, Inc., and Holloman Child Care Centers, Inc., plaintiffs below, are two non-profit and one for-profit licensed child care centers without religious affiliation. None of the petitioners has a parent company, subsidiary, or affiliate.

Respondent Larry D. Jackson, defendant below, is Director of the Department of Social Services of the Commonwealth of Virginia. Respondents Grace Baptist Church, Tabernacle Baptist Church, Berean Baptist Church and the Rock Church are four exempt church-run child care centers who intervened on behalf of a class of exempt church centers in support of the state.

Shenandoah Baptist Church and its pastor Robert L. Alderman opted out of the class of exempt centers and were dismissed from the case. They are not parties to this proceeding.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTE INVOLVED	3
REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. Neither *Amos* nor other Supreme Court Precedent Justifies an Exemption that does not Alleviate Significant Governmental Interference with Religion	11
II. In Contrast to the *Amos* Exemption, the Virginia Exemption Statute does not Alleviate any Governmental Burden on Religion	15
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, —— U.S. ——, 107 S. Ct. 2862 (1987) ..... *passim*
Cox v. New Hampshire, 312 U.S. 569 (1941) 19
De La Salle Institute v. United States, 195 F. Supp. 891 (N.D. Cal. 1961) 12
Follett v. Town of McCormick, 321 U.S. 573 (1944) 19
Forest Hills Early Learning Center, Inc. v. Lukhard, 487 F. Supp. 1378 (E.D. Va. 1980) 2
Forest Hills Early Learning Center, Inc. v. Lukhard, No. 80-1272 (4th Cir. Jan. 9, 1981) 2
Forest Hills Early Learning Center, Inc. v. Lukhard, 540 F. Supp. 1046 (E.D. Va. 1982) 2
Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F.2d 230 (4th Cir. 1984) ..... *passim*
Forest Hills Early Learning Center, Inc. v. Lukhard, No. 80-0116-R (E.D. Va. Jan. 17, 1985) 2
Forest Hills Early Learning Center, Inc. v. Lukhard, 789 F.2d 295 (4th Cir. 1986) 2
Forest Hills Early Learning Center, Inc. v. Lukhard, 661 F. Supp. 300 (E.D. Va. 1987) ..... *passim*
Forest Hills Early Learning Center v. Grace Baptist Church, 846 F.2d 260 (4th Cir. 1988) ..... *passim*
Gillette v. United States, 401 U.S. 437 (1971) 18
Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987) 14, 19
Lemon v. Kurtzman, 403 U.S. 602 (1971) 12
Murdock v. Pennsylvania, 319 U.S. 105 (1943) 19
Pierce v. Society of Sisters, 268 U.S. 510 (1925) .. 19
Stone v. Graham, 449 U.S. 39 (1980) 13
Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) 12, 13
Wallace v. Jaffree, 472 U.S. 38 (1985) 12, 13, 14

TABLE OF AUTHORITIES—Continued

Statutes: Page

United States Constitution Amendment I ..... *passim*
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1343 7
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 11, 16
Va. Code §§ 63.1-195 through 63.1-219 3
Va. Code § 63.1-196.3 ..... *passim*
2:4 Va.R. 417-462 November 25, 1985 ..... 3, 4

Other:

Opinions of the Attorney General of the Commonwealth of Virginia 507 (1977-78) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No.

FOREST HILLS EARLY LEARNING CENTER, INC.,
ACADEMY DAY CARE, INC., AND
HOLLOMAN CHILD CARE CENTERS, INC.,
Petitioners,

v.

LARRY D. JACKSON, AS DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE COMMONWEALTH OF VIRGINIA,

and

GRACE BAPTIST CHURCH, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Forest Hills Early Learning Center, Inc., Academy Day Care, Inc., and Holloman Child Care Centers, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on May 6, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 846 F.2d 260 (4th Cir. 1988) (*"Forest Hills IV"*), and is reprinted in Appendix A to this Petition (App. 1a). The Fourth Circuit's

denial of the petition for rehearing and suggestion for rehearing in banc is reprinted in Appendix E (App. 149a). The district court's final order dismissing the case is reprinted in Appendix D (App. 148a). The opinion of the United States District Court for the Eastern District of Virginia is reported at 661 F. Supp. 300 (E.D. Va. 1987), and is reprinted in Appendix B (App. 10a). An earlier opinion of the Fourth Circuit, vacating summary judgment for defendant and remanding for further proceedings is reported at 728 F.2d 230 (4th Cir. 1984) (*"Forest Hills II"*). This opinion is reprinted in Appendix C (App. 116a).[1]

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1988. The petition for rehearing and suggestion for rehearing in banc of petitioners was denied on August 3, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution Amendment I provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

---

[1] The other reported opinions in this case are, in chronological order, the opinion of the district court granting defendant's motion to dismiss, found at 487 F. Supp. 1378 (E.D. Va. 1980); the district court's opinion on cross-motions for summary judgment, published at 540 F. Supp. 1046 (E.D. Va. 1982); and the opinion of the court of appeals remanding the case for further proceedings, published at 789 F.2d 295 (4th Cir. 1986). The unpublished opinion of the Fourth Circuit, *Forest Hills Early Learning Center, Inc. v. Lukhard*, No. 80-1272 (4th Cir. Jan. 9, 1981) and the judgment of the district court denying class certification and granting summary judgment for plaintiffs, *Forest Hills Early Learning Center, Inc. v. Lukhard*, No. 80-0116-R (E.D. Va. Jan. 17, 1985), have been lodged with the Clerk of the Supreme Court of the United States.

STATUTE INVOLVED

Virginia Code Section 63.1-196.3 is set forth in Appendix F (App. 151a).

REGULATIONS INVOLVED

The Minimum Standards for Licensed Child Care Centers, effective April 1, 1986, 2:4 Va.R. 417-462 November 25, 1985, are set forth as an appendix to the district court's opinion reported at 661 F. Supp. 330 (E.D. Va. 1987), and are reprinted at Appendix B (App. 42a).

STATEMENT OF THE CASE

This case raises a critical question under the First Amendment of the United States Constitution, as yet not squarely addressed by the Court. That question is whether an exemption that relieves church-run child care centers from compliance with the religiously neutral health, safety and welfare standards applicable to non-exempt centers constitutes an impermissible establishment of religion.

Since at least 1948, the Commonwealth of Virginia (the "state") has required that child care centers comply with licensing standards. From 1968 to 1979, all child care centers were subject to the licensing requirements of Va. Code §§ 63.1-195 through 63.1-219 and applicable standards promulgated pursuant thereto. Faced with a rapidly growing number of child care centers and an increasing number of complaints from parents concerning inadequate facilities and care at many centers, the Virginia Department of Welfare (now the Department of Social Services) undertook a review of its licensing standards during the early 1970's. It found that many centers were more concerned with maintaining competitive prices and financial stability than with protecting the best interests of children in their care. In order to protect children

by ensuring a safe and healthy environment in centers, the Department of Welfare promulgated new minimum child care standards for licensed centers in 1976. These standards, as revised in 1986, are reprinted in Appendix B (App. 42a). The licensing standards address such areas as ventilation, heat, light, nutrition, cots, health, safety, space per child, child/staff ratios, administrative structure, staff qualifications, recordkeeping, financial capacity and disciplinary practices.

The Division of Licensing of the Department of Social Services must issue a license when it determines that a child care center meets substantially the standards adopted by the State Board of Social Services and any additional requirements that may be specified by the Virginia Code. The Division, however, may grant a variance from the minimum standards in two instances: (a) when compliance with a particular minimum standard poses a hardship for a center and an alternative method of compliance would satisfy the intent of the standard; or (b) when the actual suspension of the standard would not endanger the safety or well-being of the children and would not create a violation of statutes or the requirements of another regulatory agency. The Division of Licensing considers religious beliefs to be an important factor in granting variances. Thus, a variance is available should a church center object to specific standards on free exercise grounds.

A year after the 1976 licensing standards were adopted, a few licensed church centers, including respondents Tabernacle Baptist Church and Berean Baptist Church, raised religious objections to licensing *per se* for the first time. These objections prompted the Attorney General of Virginia to investigate the issue. The Attorney General "found no instance of an impact on religious belief and practice such as to negate these regulations of

general application" and concluded that the child care standards "do not violate First Amendment rights and are enforceable against centers operated by religious institutions." Opinions of the Attorney General 507, 509 (1977-78), cited in *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 243 n.14 (4th Cir. 1984) (*"Forest Hills II"*) (App. 139a).

The objecting churches subsequently took their complaints against licensing to the Virginia legislature. In 1979, Virginia enacted Va. Code § 63.1-196.3 (the "exemption statute") exempting all "[c]hild care center[s] operated or conducted under the auspices of . . . religious institutions" from compliance with the licensing requirements of the Virginia Code. Under the exemption statute, religiously affiliated child care centers that elect exempt status are relieved from complying with virtually all of the minimum child care standards, which were previously applicable to all child care centers.[2]

In contrast to the comprehensive health, safety and welfare standards protecting children in non-exempt centers, the exemption statute sets only minimal standards. Instead of obtaining a license, a religiously affiliated child care center wishing to operate an exempt center merely needs to

1. file with the Commissioner of Welfare an initial statement of intent to operate a child care center;
2. file an annual statement of intent to operate an exempt child care center;

---

[2] Many church-run child care centers have chosen to obtain licenses, rather than take advantage of the exemption. Among the 215 centers that could obtain exempt status, at least 106 centers have elected to operate with licenses. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 661 F. Supp. 300, 309 (E.D. Va. 1987) (App. 25a).

3. certify that staff qualifications have been disclosed to parents or guardians of enrolled children;
4. present documentation of tax-exempt status, compliance with local health and fire ordinances; and
5. make public disclosure of certain aspects of the operations.

Va. Code § 63.1-196.3.A.

The exemption statute provides the state with limited methods of enforcing these minimal standards. If an exempt center does not file a statement of intent, the Commissioner may take appropriate action, including filing suit to enjoin the operation of the center. Va. Code § 63.1-196.3.B. A local welfare, health or fire department may inspect an exempt center and take appropriate action only if a parent or guardian complains to the local agency. *Id.* at § 63.1-196.3.C. In contrast, in the case of non-exempt centers, the state enforces compliance with the minimum child care standards through state inspection and administrative procedures.

Thus, the exemption statute relieves religiously affiliated centers from compliance with standards enforceable by state agency inspection and legal sanctions in the "critical areas of licensing itself, and of program, insurance, financial resources and management, staff qualifications, and internal administration following licensing . . . ." *Forest Hills II*, 728 F.2d at 236 (App. 124a). Under the exemption statute, church-run centers are exempt from standards relating to nutrition, space, heat, light, ventilation and physical safety.

Plaintiffs are three licensed child care centers without religious affiliation operating in Virginia. On February 1, 1980, they brought an action against William L. Lukhard, Director of the Department of Welfare,[3] challeng-

[3] In 1987, Larry D. Jackson, as Director of the Department of Social Services of the Commonwealth of Virginia, was substituted for William L. Lukhard.

ing the constitutionality of Va. Code § 63.1-196.3 as, *inter alia*, an establishment of religion and a denial of the equal protection of the laws. Jurisdiction in the district court was based on 28 U.S.C. § 1343. The state defended the exemption as a permissible accommodation of the potential free exercise rights of some church-run child care centers, despite the Attorney General's finding that the regulations posed no such concern.

On February 7, 1984, the court of appeals vacated an order of the district court upholding the validity of the exemption statute. *Forest Hills II*, 728 F.2d at 247 (App. 146a). It found that "[t]he exemption, on its face, and as a matter of law was overbroad in relation to the secular legislative purpose claimed for it," which was the accommodation of potential free exercise rights. *Id.* at 244 (App. 140a). The court, however, remanded for the limited purpose of allowing church-run centers an opportunity to intervene as a class to demonstrate that the application of specific child care standards to their centers would infringe on their free exercise of specific religious beliefs. *Id.* at 246 (App. 143a-144a).

Respondents Grace Baptist Church, Tabernacle Baptist Church, Berean Baptist Church and the Rock Church moved to intervene on behalf of a class of all exempt centers, and a class was subsequently certified. At trial on March 9, 1987, the church-run centers acknowledged that the state has a compelling interest in protecting children. Representatives of the churches testified that virtually none of the standards would infringe on their religious beliefs and that they complied with most of the standards in any event.

The churches' central objection to the licensing requirements came down to the proposition that licensing in and of itself burdens their free exercise rights. This objection was largely founded on their fear that the state could arbitrarily deny licenses to church-run centers, even if they complied with all of the child care standards. The

district court rejected the argument that licensing to certify compliance with concededly unobjectionable standards would, in and of itself, burden free exercise rights. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 661 F. Supp. 300, 311 (E.D. Va. 1987) (App. 28a). Furthermore, as the district court found, the churches failed to show that application of particular exempt activities would impinge on the free exercise of their religious beliefs. *Id.* at 316 (App. 39a).

On appeal, the Fourth Circuit reversed the position it had taken in *Forest Hills II* and concluded that *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, —— U.S. ——, 107 S. Ct. 2862 (1987) ("*Amos*"), required it to uphold the constitutionality of the Virginia exemption statute. *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988) ("*Forest Hills IV*").

REASONS FOR GRANTING THE WRIT

A critical question that arises under the religion clauses of the First Amendment has to do with the competing tension between the two clauses. This case presents that question in stark terms.

To state the matter in simplified form: if a state (or the Congress) applies a safety regulation to a church that affects the church's religious activities or practices, the imposition of that burden may impair the church's free exercise of religion and violate that clause of the First Amendment. If, on the other hand, a state (or the Congress) relieves a church from compliance with safety standards applicable to all others, that act of exemption may "establish" a religion by favoring religion over nonreligion and may therefore violate the Establishment Clause. When both clauses are implicated by governmental action, courts must examine carefully the countervailing dictates of each clause to ensure that one clause does not override the other.

The need to prevent one clause from swallowing up the other is especially illustrated by this case. The critical question presented here is whether a court must uncritically accept a state's decision to exempt church-run centers from health and safety licensing standards that the churches find unobjectionable, because some churches object to the act of licensing itself.

In answering that question affirmatively, the court of appeals announced a new rule of religion clause law that drastically alters the delicate constitutional balance between the countervailing dictates of the religion clauses. The proponents of the exemption—the respondent churches—claim flatly that the act of licensing *any* of their activities, including the operation of a child care center, in and of itself, would violate the Free Exercise Clause because it would amount to a recognition that the state is superior in authority to Jesus Christ. Therefore, they assert that exempting them from regulations that pose no conceivable burden on religion is permissible under the Establishment Clause, even if it is not compelled by the Free Exercise Clause. The court of appeals accepted this position, something no other court has ever done.

This is a fundamental error with serious consequences. Churches and their employees and activities are subject to a wide variety of regulatory and licensing requirements designed to promote the health and safety of the people. A church may not be built on land that is not zoned for such a purpose in the absence of a specific exemption. A church employee may not operate an automobile on church business unless he or she possesses a state-issued operator's permit and unless the automobile is properly registered by the state. A church may not operate a cafeteria for its communicants unless the local health department approves the cafeteria. If a state may now exempt all of these activities from licensing and other health-and-safety regulations simply because some

churches want to be free of such regulation, the delicate balance between the two religion clauses will be severely distorted. Neither religion nor the health and safety of the people will be advanced by such a rule of constitutional law.

In propounding this new rule of religion clause law, the court of appeals purported to follow *Amos*. The court erred, however, by misperceiving the standard set in *Amos* and by ignoring significant facts that compel a quite different analysis and result here. First, the Court in *Amos* upheld an exemption permitting discrimination based on religious grounds because the exemption alleviated significant governmental interference in the ability of certain organizations to define and carry out their religious missions. *Amos* does not sanction all exemptions based on the mere assertion of free exercise concerns—rather, it requires that an actual burden on free exercise rights be alleviated before an exemption may be justified. The Fourth Circuit required no such showing.

Second, the significant differences in the purpose, scope and effect of the two exemptions demonstrate that the *Amos* standard should not be radically extended to permit a religious exemption from health and safety standards having no conceivable impact on free exercise rights. Although the exemption at issue in *Amos* was arguably broader than what may be constitutionally required by the Free Exercise Clause, it served to ensure that core free exercise rights requiring constitutional protection were in fact fully protected by the exemption. In contrast, the broad exemption at issue here does not serve to ensure the effectiveness of a narrower, constitutionally compelled exemption. No free exercise concerns are implicated by imposition of standards relating to such areas as the number of cots, heat, light, nutritious meals and minimum space per child in child care centers.

Thus, *Amos* provides no basis for the Fourth Circuit's decision to uphold the exemption from generally applicable

health, safety and welfare standards granted the church-run centers. Guidance from the Court to correct an unwarranted and novel ruling in this important and difficult area of constitutional law is necessary to ensure that the delicate balance between the countervailing prohibitions of the two religion clauses is not severely distorted.

I. Neither *Amos* nor other Supreme Court Precedent Justifies an Exemption that does not Alleviate Significant Governmental Interference with Religion.

At the outset, it bears emphasis that the central free exercise claim on which the Fourth Circuit justified the churches' exemption from child care standards is a narrow but radically new one: requiring churches to do anything more than simply assert that their free exercise rights would be burdened imposes a sufficient burden on religion, in and of itself, to warrant a general exemption from regulation and thereby foreclose any judicial inquiry concerning the validity of the churches' assertions.

No decision of this Court or any court, however, stands for the proposition that an exemption said to accommodate such a claim is permissible under the Establishment Clause absent any showing whatsoever that the standards to which the licensing applies actually burden religion. To read *Amos* as support for such a proposition is an unwarranted expansion of the case, which leads to the anomolous result of permitting the intervenor churches to determine the constitutionality of the exemption statute.

In *Amos*, a building engineer brought suit against a church for religious discrimination after he was fired from his job at a church-run, non-profit gymnasium for failing to qualify as a church member. The church defended its action under the exemption granted to religious organizations from the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against discrimination on the basis of religion in employment connected with the organization's carrying on of its activities. 42 U.S.C. § 2000e-1.

At issue in *Amos*, as here, was the extent to which the government may go beyond what is mandated by the Free Exercise Clause to accommodate religion without violating the Establishment Clause. The Court analyzed the Establishment Clause challenge under the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the first prong of the *Lemon* test, a statute is unconstitutional if it lacks a secular purpose. The Court found that a valid, secular legislative purpose exists when Congress enacts an exemption "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, —— U.S. at ——, 107 S. Ct. at 2868. As Justice O'Connor emphasized in her concurrence, there must be "an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action." *Amos*, —— U.S. at ——, 107 S. Ct. at 2874-75 (O'Connor, J., concurring) (emphasis in original).

The Court reached the same conclusion in *Wallace v. Jaffree*, 472 U.S. 38 (1985). There, the Court focused closely and at length on Alabama's "actual purpose" in enacting a voluntary prayer statute. The Court considered the state's claim that the statute served a secular purpose of accommodating free exercise rights. *Id.* at 57-58, n.45. In an opinion joined in by Justices Brennan, Marshall, Blackmun and Powell, Justice Stevens noted that the claims "seem to be based on the theory that the free exercise of religion of some of the state's citizens was burdened before the statute was enacted." Justice Stevens concluded that Alabama had not made a serious attempt to substantiate the claim of infringement of free exercise rights and therefore found that there was "no basis for the suggestion." *Id.*; *compare De La Salle Institute v. United States*, 195 F. Supp. 891 (N.D. Cal. 1961) (operation of church winery). *See also Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 (1985) ("It is virtually self-evident that the

Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program *actually burdens* the claimants' freedom to exercise religious rights") (emphasis added); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (judicial inquiry must go behind state's "avowed" secular purpose).

The standard set forth in *Amos* and *Jaffree* is precisely the standard that the Fourth Circuit correctly applied in *Forest Hills II*, but then abandoned in *Forest Hills IV* based on its erroneous reading of *Amos*. In *Forest Hills II*, the Fourth Circuit concluded that "[t]he [child care] exemption, on its face, and as a matter of law was overbroad in relation to the secular legislative purpose claimed for it." 728 F.2d at 244 (App. 140a). However, the Fourth Circuit concluded that it was necessary to determine whether and to what extent free exercise rights justifying the exemption existed before declaring the exemption invalid. *Id.* at 246 (App. 143a-145a). Thus, on remand the focus was to be on "the extent of any free exercise rights had by the sectarian institutions in the exempted activities, and the nature and extent of any compelling state interest in nevertheless regulating those activities." *Id.* (App. 144a-145a). The Fourth Circuit's directive in its 1984 decision was simply another way of stating the requirement enunciated in *Amos*: at a minimum, some burden must be placed on religious organizations in order to justify an exemption which is granted solely on the basis of religion under the Free Exercise Clause.

In *Forest Hills IV*, however, the Fourth Circuit reached quite the opposite conclusion. It held that churches should not be required to show that the application of the child care standards to their centers would result in some demonstrable, actual burden on their free exercise rights, thus immunizing the exemption from judicial scrutiny. 846 F.2d at 263 (App. 6a-7a). If the Fourth Circuit's most recent view were to apply, the Es-

tablishment Clause would be swallowed up under the guise of accommodating religion. As the Fourth Circuit had previously noted in rejecting just such a standard, "it cannot be the case that merely by asserting such a legislative purpose in litigation the state is entitled to have its legislature's accommodation to assumed free exercise rights confirmed by courts without any judicial inquiry into the validity of the assumption." *Forest Hills II*, 728 F.2d at 240 (App. 131a). Legislative action would be effectively immunized from meaningful, constitutional review if such a standard were employed. *Id.* (App. 131a-132a).

Moreover, assuming the existence of a burden on free exercise rights whenever asserted by a church would preclude examination of whether a compelling state regulatory purpose were ever countervailing. Under this view, the legislature could exempt all activities of religious institutions from all secular health and safety regulations as an accommodation of religion without ever running afoul of the Establishment Clause. But, as Justice O'Connor observed in *Wallace v. Jaffree*,

> [j]udicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause.

472 U.S. at 82. At some point, accommodation of religion becomes an unconstitutional establishment of religion by the state. *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987).

To insulate government action, particularly action that on its face treats religion differently from non-religion, from judicial scrutiny by the mere assertion of a free exercise concern would erode the protection of the Establishment Clause. The only way the courts can determine whether an accommodation has gone too far is to inquire into the validity of the asserted free exercise concern. Thus, an inquiry into the existence of free exercise rights

justifying the exemption was both proper and necessary under *Amos*. Only the existence of free exercise rights that would suffer in the absence of an exemption can justify an exemption from generally applicable health and safety standards. It was just such a requirement of demonstrating an actual burden on the churches' free exercise of their religion that the district court applied and the churches failed to meet on remand. *Forest Hills*, 661 F. Supp. 330. The failure of the Fourth Circuit to require the same showing is contrary to *Amos* and other First Amendment cases delineating the boundaries of the religion clauses.

II. In Contrast to the *Amos* Exemption, the Virginia Exemption Statute does not Alleviate any Governmental Burden on Religion.

In upholding the constitutionality of the Virginia exemption statute, the Fourth Circuit found that a burden on religion existed solely by requiring the churches to show that licensing of their child care centers would actually impose a burden on them. As discussed above, that standard is incorrect. The state and churches must show that the exemption relieves significant governmental interference with the ability of the churches to define and carry out their religious missions. An examination of the significant differences in the purpose and effect of the *Amos* exemption and the Virginia exemption, as well as an examination of the record in this case, shows why the churches were unable to demonstrate that licensing infringed on any of their free exercise rights.

The *Amos* exemption removes a significant burden on religion while the Virginia child care exemption does not. As the Court in *Amos* made clear, a state cannot prohibit a church from discriminating on grounds of religion in hiring a minister or other personnel engaged in religious activities. To that extent, an exemption from Title VII's prohibition against discrimination on the basis of

religion and employment, *see* Title VII, 42 U.S.C. § 2000e *et seq.*, would be required by the Free Exercise Clause.

The exemption went further by also exempting hiring for secular positions. The Court concluded that the broader exemption relieved a significant burden on religion. The Court observed that in the absence of the exemption, it would be exceedingly difficult to draw a line between secular and religious positions and that wherever the line was drawn, a church might be inhibited in hiring for what it felt were truly religious positions. An exemption limited to religious employment would be insufficient to protect free exercise rights because a church could not know in advance what positions would be deemed secular and thus subject to regulation. In addition, since a church's choice of employees for any position may involve religious considerations and affect its ability to carry out its religious mission, such uncertainty could easily burden its free exercise rights. As Justice Brennan observed, "[d]etermining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself." *Amos*, —— U.S. at ——, 107 S. Ct. at 2871 (Brennan, J., concurring). Accordingly, the Court ruled that Congress could go beyond what is constitutionally required by the Free Exercise Clause to exempt all church employment, whether those positions are properly characterized as religious or secular.

Thus, *Amos* stands for the proposition that a broader exemption from a regulation based expressly on a religious distinction is permissible when it ensures the achivement of a narrower, constitutionally compelled exemption. While *Amos* upheld the constitutionality of the exemption from the prohibition against religious discrimination in a religious organization's secular activities, the exemption is still narrowly focused: the exemption encompassing secular employees serves to ensure

that churches will experience no interference in hiring persons for what they consider to be religious positions and permits churches to define their community by employing only those who adhere to their beliefs. Moreover, the exemption applies only to religious discrimination in employment; churches remain subject to Title VII's prohibitions against discrimination in employment based on race and sex. On the other hand, *Amos* does not stand for the proposition that a broad exemption from religiously neutral health and safety regulations can be justified as a permissible accommodation of religion where no exemption at all is constitutionally required.

The exemption at issue in this case is thus distinct from the exemption at issue in *Amos* and cannot be justified on the grounds set forth in *Amos*. At trial the churches conceded that they have no free exercise objections whatsoever to all but a few of the standards. Indeed, they believe that they comply with most of the standards, and they would have no objection if the exemption statute required compliance with all such standards. Respondents Tabernacle and Berean could point to no instance during the period in which they were licensed where the state interfered with their ability to define and carry out their religious missions. The churches failed to show that application of any of the child care standards to their centers would burden their religion. The churches failed to show how, for example, a church center's decisions concerning minimum space per child, provision of cots and the provision of nutritious food in any way affect that church's ability to define and carry out its religious mission. As the Fourth Circuit had previously observed in *Forest Hills II*, standards governing these aspects of child care "are manifestly and properly concerned with the health, safety and welfare of the children" in child care and could not conceivably infringe on the free exercise of religion. 728 F.2d at 244 (App. 140a). These activities "fall completely outside the realm of protected 'religion' . . . ." *Id.* at 243-44 (App. 137a).

The minimum child care standards do not give the state the right to determine whether a church may operate a child care center as part of its ministry. The minimum child care standards do not affect the church-run centers' right to hire employees who share their religious views. The minimum child care standards do not affect the church-run centers' right to infuse their child care programs with a religious training and content of their choosing. Because the child care standards are religiously neutral, the exemption from these standards does not serve to avoid a direct conflict with religious belief. *See Gillette v. United States*, 401 U.S. 437 (1971).

On the other hand, the exemption statute removes the exempt centers from regulations setting minimum levels of health and safety, which were designed to ensure the well-being and safety of children in child care away from the home. The licensing requirements have the same purpose and effect as building, safety and sanitation codes which are applicable to church-run centers. The churches offer no principled distinction for their opposition to licensing requirements and their willing compliance with building and safety requirements.[4] The logic of the position of the Fourth Circuit and the churches leads to the inescapable conclusion that the state could, on free exercise grounds, exempt church-run centers from all safety and health requirements, including those found in building, fire and sanitation codes. Moreover, a church would have clear knowledge that these secular activities would

---

[4] The churches' fear that the state could arbitrarily deny a license even if a center had complied with all regulations is unfounded. The state has not acted arbitrarily and unconstitutionally in the past, *Forest Hills*, 661 F. Supp. at 310 (App. 27a), and the fear that it might do so in the future is insufficient to justify a blanket exemption from health, safety and welfare standards. More importantly, the state may deny a license *only* if the applicant does not substantially meet the minimum standards or certain provisions of the Virginia Code. *Id.* (App. 28a) There are sufficient administrative and judicial safeguards to ensure that the licensing authority conforms to the laws. *Id.* at 310-11 (App. 28a).

be subject to regulation. Thus, there can be no concern that the regulation of such clearly non-religious activities could in any way inhibit or chill the free exercise of religious beliefs in any religious activities. In ruling to the contrary, the Fourth Circuit misconceived the import of *Amos* and incorrectly determined that the decision of the district court should be reversed.

The justification advanced by the Fourth Circuit—avoiding the unseemly clash of church and state—cannot support an exemption from regulations that do not in any way infringe on free exercise rights. *Forest Hills IV*, 846 F.2d at 263 (App. 6a). The question remains the existence of an actual burden on religious organizations. The incidental contact that occurs when generally applicable health and safety regulations are applied to churches is not a sufficient burden to justify an exemption. It is well established that a state may regulate the activities of religious organizations so long as it does not infringe upon the actual exercise or dissemination of religious beliefs. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Cox v. New Hampshire*, 312 U.S. 569 (1941). Concomitantly, a state cannot, under the guise of religious accommodation, exempt a religious institution from health or safety requirements that could not conceivably burden the expression of any religious belief.

The courts constantly struggle to balance the tensions between the two religious clauses of the First Amendment. At some point, however, an accommodation of religion becomes an "unlawful fostering of religion." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987). The Virginia exemption statute is such a case. The Court should grant this writ to resolve the critical question of whether a religious exemption from health and safety regulations that do not impose

any burden on the free exercise of religion violates the Establishment Clause of the First Amendment.

CONCLUSION

The writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

JOHN VANDERSTAR
(Counsel of Record)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

JOHN E. HEINTZ
STEPHANIE E. HUMBERT
POPHAM, HAIK, SCHNOBRICH
& KAUFMAN, LTD.
1800 M Street, N.W.
Suite 300 South
Washington, D.C. 20036
Counsel for Petitioners